Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MONTGOMERY BLAIR SIBLEY,

Petitioner,

vs.

BARBARA SIBLEY,

Respondent.

On Petition for Writ of Certiorari to the Florida Third District Court of Appeal

Petition for Writ of Certiorari

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44 pp

QUESTIONS PRESENTED FOR REVIEW

The Florida Third District Court of Appeal has re-instated the debtor's prison without notice or an opportunity to be heard by the Petitioner expressly holding that Petitioner can be indefinitely incarcerated for civil contempt of court for failure to pay a purge amount even though Petitioner does not have the present ability to pay such sum. This holdings raise three substantial federal questions that warrant immediate review by this Court:

1. Whether the Florida Third District Court of Appeal violated the due process clause of the Fourteenth Amendment by utilizing the "tipsy coachman" or the "right for the wrong reason" doctrine on appeal in a manner which precluded Petitioner from receiving "notice" before they affirmed Petitioner's sentence of indefinite incarceration under a legal theory not raised in or relied upon by the trial court?

2. Whether the Florida Third District Court of Appeal violated the due process clause of the Fourteenth Amendment by utilizing the "tipsy coachman" or the "right for the wrong reason" doctrine on appeal in a manner which precluded Petitioner from receiving an opportunity to be heard before they affirmed a sentence of indefinite incarceration under a legal theory not raised in or relied upon by the trial court?

3. Whether the Florida Third District Court of Appeal violated the due process and equal protection clauses of the Fourteenth Amendment by imposition of a sentence of indefinite incarceration of Petitioner for indirect civil contempt when Petitioner did not personally possess the means to purge his contempt?

PARTIES TO THE PROCEEDINGS

The following individuals and entities are parties to the proceeding in the court below:

Montgomery Blair Sibley, Petitioner/Appellant.

Barbara Sibley, Respondent/Appellee.

CORPORATE DISCLOSURE STATEMENT

No parties are corporations. Sup. Ct. R. 29.6.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings ii

Corporate Disclosure Statement ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Constitutional Provisions, Statutes and Regulations Involved 2

Statement of the Case 3

Reason for Granting the Writ 7

I. Florida's Did Not Provide "Notice" to Petitioner of the Basis For Finding That Petitioner Had the Present Ability to Pay 8

II. Florida's Did Not Provide "An Opportunity to Be Heard" Prior to the Finding That Petitioner Had the Present Ability to Pay 13

III. The Contempt Order Was Criminal, Not Civil 16

Conclusion 19

Contents of Appendix A-1

TABLE OF AUTHORITIES

Cases

Carraway v. Armour & Co., 156 S0.2d 494 (1963) 8-9

Gompers v. Buck's Stove & Range Company, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911) 16

Helvering v. Gowran, 302 U.S. 238; 58 S.Ct. 154; 82 L.Ed 224 (1937) 9-10

Int'l Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) 7

Perez v. Perez, 599 So.2d 682, 683 (Fla. 3d DCA 1992) 17-18

S.E.C. v. Chenery Corp., 318 U.S. 80; 63 S.Ct. 454; 87 L.Ed. 626 (1943) 14-15

Other Authorities

U.S. Constitution, Fourteenth Amendment 2

28 U.S.C. §1257 2

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

Petitioner Montgomery Blair Sibley, through undersigned counsel, prays that a writ of certiorari issue to review the judgment and opinion of the Florida Third District Court of Appeal entered on December 23, 2002 – which the Florida Supreme Court by a vote of 4-3 declined to review on August 18, 2003 – because the Florida Third District Court of Appeal has far departed from the requisite course of due process and equal protection for imprisonment for contempt, thus denying Petitioner's rights, privileges and/or immunities under the United States Constitution and in a manner which conflicts with relevant decisions of this Court.

OPINIONS BELOW

The November 22, 2002, order of the Florida Circuit Court in and for Miami-Dade County, Florida is reprinted in the appendix hereto, *Appendix-2, infra*. The December 23, 2002, opinion of the Florida Third District Court of Appeals is reprinted in the appendix hereto, *Appendix-5, infra*. The August

18, 2003, order of the Florida Supreme Court is reprinted in the appendix hereto, *Appendix-17, infra.*

JURISDICTION

The judgment of the Florida Supreme Court was entered on August 18, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In September 1994, Petitioner, Montgomery Blair Sibley, and Barbara Sibley were divorced in the State of Florida. Petitioner was given custody of the three children of that marriage and after the division of property neither paid nor received child support or alimony. From 1994 to September 2000, Petitioner, while living in Florida, was the "primary residential custodian" of the three children, and at all times was a nurturing father.

In 1996, Petitioner re-married. In the spring of 2000, pursuant to the 1994 Marital Settlement Agreement and the subsequent order of the Florida Family Court, Petitioner provided notice to his former wife of his intent to relocate to Maryland with the minor children due to the depressed economics in the State of Florida.[1]

In flagrant disregard of his rights and in violation of the relevant court orders, Petitioner's former wife refused to return

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[1] Petitioner is a member in good standing of the States of New York and Florida Bars, and the District of Columbia Bar.

the children to him at the conclusion of their summer of 2000 vacation. Instead, the former wife moved for a change in custody in the Florida Family Court on July 27, 2000.

Two years later, on August 5, 2002, that motion to change custody was finally determined by the Florida Family Court, which refused to enforce Petitioner's rights in his minor children and instead – notwithstanding Petitioner's current economic condition ($36,000/year; negative net worth) and that of his former wife ($250,000/year; $1,000,000+ net worth) – ordered that Petitioner pay to his former wife $100,000 in arrearages of child support calculated at $4,000 per month from July 2000, $4,000/month going forward plus tuition to private schools and college for the three children in the amount of $175,000 for a total of $275,000.

When Petitioner was predictably unable to pay the $275,000, Petitioner was incarcerated for "indirect contempt" on November 22, 2002, upon the Florida Family Court's finding that Petitioner "continues to 1) have the ability to pay the past due child support (of $100,000), and 2) that he is willfully refusing

to pay his child support obligation." *Appendix-3, infra.*

The following day, November 23, 2003, Petitioner filed a notice of appeal with the Florida Third District Court of Appeal of the November 22, 2002, Family Court order which was assigned Case No. 3D02-3171.[2]

On December 23, 2003, two judges of the Florida Third District Court of Appeals entered the majority opinion in *Sibley v. Sibley*, Case No. 3D02-3171, 833 So.2d 847 (Fla. 3d DCA 2002) *Appendix-5, infra* affirming Petitioner's incarceration "for indirect contempt," holding remarkably that (i) "the record shows substantial assets, although admittedly **not in the purge amount**, in his [Petitioner's] own name", *Appendix-14, infra* at footnote #2, and (ii) Petitioner "**may command, simply by asking, the payment of the purge amount through his very wealthy father. . .**" *Appendix-5, infra.* (Emphasis added).

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[2] A petition to this Court regarding the propriety of the disposition of Petitioner's state habeas corpus petitions is pending as case number 03-370.

In the dissenting opinion the Honorable Judge Cope, pointed out that the holding of the majority that Petitioner's "very wealth father" can pay was issued by the majority based on the "`tipsy coachman' doctrine, or `right for the wrong reason' rule" for which there was no factual support in the record. *Appendix-8, infra.*

On August 18, 2003, in a 4-3 decision, the Florida Supreme Court entered its order denying discretionary review of the December 23, 2002, order of the Florida Third District Court of Appeal.

REASONS FOR GRANTING THE WRIT

The reason for granting this writ is that Florida's indefinite incarceration[3] of Petitioner for civil contempt violated Petitioner's federal due process guarantees by (i) not affording him "notice" of the basis for his incarceration and (ii) precluding him from an "opportunity to be heard" prior to his continued incarceration under an entirely different legal theory of "ability to pay" than noticed in or utilized by the Florida Family Court. Additionally, the finding of "indirect civil contempt" was a misnomer for what was in fact a criminal contempt. As such, the failure of Florida to accord to Petitioner the protections of criminal contempt violated Petitioner's due process and equal protection rights.

As this Court noted in *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994), "In contrast, civil contempt sanctions, or those

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[3] An informal survey showed that approximately 15,000 men are in jail on any given day for missing child-support payments. *Men's Health,* Jun 2003. Vol. 18, Iss. 5; pg. 149.

penalties designed to compel future compliance with a court order, are considered to be coercive and **avoidable through obedience**, and thus may be imposed in an ordinary civil proceeding **upon notice and an opportunity to be heard**." (Emphasis added).

Here, Petitioner was afforded neither notice nor an opportunity to be heard, and as such, the procedure employed by the Florida Third District Court of Appeal in affirming a wrongly-entered civil contempt incarceration violates federal due process guarantees.

Moreover, the contempt order was not "avoidable through obedience" as Petitioner did not have the means to obey the order as he had no legal ability to "command" his Father to pay Petitioner's child support obligations.

I. Florida's Did Not Provide "Notice" to Petitioner of the Basis For Finding That Petitioner Had the Present Ability to Pay

Here, through the legerdemain of Florida's "Tipsy Coachman" doctrine, Petitioner was indefinitely incarcerated without being afforded "notice of" or "an opportunity to be

heard on" the novel legal theory that even though Petitioner did not have the ability to purge his contempt, he could "command" his father to do so. The Florida Third District Court of Appeal based this factual conclusion that he therefore possessed the "keys in his own pocket" to secure his release from incarceration without (i) prior notice to Petitioner that this was the legal theory and (ii) without factual support in the record.

Florida's "Tipsy Coachman" doctrine arises from the Florida case of *Carraway v. Armour & Co.*, 156 S0.2d 494 (1963) wherein the Florida Supreme Court – faced with a workman's compensation claim denial by an intermediate appellate panel – found that the original conclusions of the trial court were correct, albeit for the wrong reasons. The court there held:

> It is our opinion that the deputy commissioner arrived at a substantially correct conclusion though he erroneously proceeded under § 440.15(6)(f), whereas the injury should have been treated as non-scheduled and benefits awarded accordingly. We are reminded of Goldsmith's RETALIATION:
>
> The pupil of impulse, it forc'd him along, His conduct still right, with his argument wrong;

> Still aiming at honour, yet fearing to roam, The coachman was tipsy, the chariot drove home.

Subsequently, the "Tipsy Coachman" doctrine has been utilized in numerous other Florida Cases to justify affirming a result reached for the wrong legal reason.

And indeed, the federal courts utilize a similar rule known generally as the "right for the wrong reason" rule. As noted by this Court in *Helvering v. Gowran*, 302 U.S. 238; 58 S.Ct. 154; 82 L.Ed 224 (1937):

> In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. (Numerous citations omitted).

Id. at 245.

However, when a conflict results between the due process guarantees to a civil contemptor of notice and an opportunity to be heard and the "Tipsy coachman" doctrine, the conflict must be resolved in favor the superior right: due process.

Here, that conflict arises because of the different conclusions regarding Petitioner's ability to pay the purge

amount at the trial and appellate levels. At the Family Court level, the finding of civil contempt and imposition of a term of indefinite incarceration until the purge amount of $100,000 was paid was premised solely upon the finding of the Family Court that Petitioner "continues to 1) have the ability to pay the past due child support". *Appendix, p-3.*

Fantastically, upon reviewing the record, the majority opinion of the Florida Third District Court of Appeal admitted that the Florida Family Court was wrong and that "the record shows substantial assets, although admittedly **not in the purge amount**, in his [Petitioner's] own name" *Appendix-14, infra* at footnote #2. Accordingly, Petitioner was indefinitely incarcerated for civil contempt without the ability to purge the $100,000 amount. As such, the civil contempt incarceration was error or this was criminal contempt without the requisite procedural safeguards.

However, to achieve the apparently pre-determined

result from a hostile court[4] faced with no legal basis to affirm the Florida Family Court's incarceration order, the majority established an entirely new legal theory of "ability to pay" concluding that Petitioner "**may command, simply by asking, the payment of the purge amount through his very wealthy father. . .**" *Appendix-5, infra.* (Emphasis added).

Plainly, as detailed in the dissent by Judge Cope, the Florida Family Court did not base its determination of Petitioner's ability to pay upon the finding that Petitioner could "command his very wealth father" to pay the purge amount. Hence, Petitioner arrived at the Florida Third District Court of Appeal ready, willing and able to contest – and indeed did contest successfully – the Florida Family Court's baseless finding that Petitioner had the ability to pay the purge $100,000 amount.

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[4] Notice should be taken of the majority's gratuitous *ad hominem* footnote number 4 where the wrongly described un-related litigation – including litigation between Petitioner and the majority panel judges – is detailed.

Indeed, and as noted by Judge Cope, Petitioner did not arrive at the Florida Third District Court of Appeal with any notice that his incarceration was now to be premised solely – under a novel theory of law – because Petitioner did not "command" his allegedly "very wealth father" to pay the purge amount. *Appendix-7, infra.* As such, Petitioner was not given "notice" of the basis for his incarceration.

Hence, for the Florida Third District Court of Appeal to invoke the "Tipsy Coachman" doctrine in this fashion to affirm an incarcerative civil contempt order which they admitted was without factual support, denied to Petitioner "notice" as to why he was being incarcerated. Accordingly, Petitioner was denied due process of law.

II. Florida's Did Not Provide "An Opportunity to Be Heard" Prior to the Finding That Petitioner Had the Present Ability to Pay

Likewise, the Florida Third District Court of Appeal's employment of the "Tipsy Coachman" doctrine denied Petitioner an "opportunity to be heard" in violation of due process

guarantees.

The entire proceedings in the Florida Family Court were conducted upon the single theory – expressed in the motion for contempt by the former wife and found as the sole basis for the incarceration by the Florida Family Court – that Petitioner's personally possessed the ability to pay. "The trial court fashioned the contempt order and purge amount based on the trial court's conclusions regarding the **[Petitioner]'s** ability to pay. (Emphasis in original). *Appendix-11, infra.*

Then, without notice, the Third District Court of Appeal determined that incarceration for an indefinite period for civil contempt was appropriate based upon Petitioner's ability to "command" his "very wealth father" to pay Petitioner's purge amount. Significantly, by utilizing the "Tipsy Coachman" doctrine in this manner, the Third District Court of Appeals has prevented Petitioner from "an opportunity to be heard" on this novel legal theory. Had such an opportunity been accorded to Petitioner, a different and fairer record would have been presented to the Florida Family Court and subsequently the

Third District Court of Appeals which record would have dispositively dispelled the absurd conclusion that Petitioner has the ability to compel his Father to do anything.

Indeed, the record that was presented the Third District Court of Appeals was seriously flawed, inaccurate and incomplete as it had been developed solely upon the theory that Petitioner personally had the ability to pay. As noted by Judge Cope in his dissent from the majority opinion, "It is telling that the trial court itself restricted the amount of inquiry which could be made of [the very wealthy father]." *Appendix-10, infra.* As such, the Third District Court of Appeals made factual finding sitting as a jury that simply had no evidentiary support in the record.

In an analogous situation, when a "right for the wrong reason" ruled was employed by this Court, the prohibition against the appellate court sitting as a jury was expressly recognized. In *S.E.C. v. Chenery Corp.*, 318 U.S. 80; 63 S.Ct. 454; 87 L.Ed. 626 (1943), this Court held:

In confining our review to a judgment upon the

> validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S.Ct. 154, 158, 82 L.Ed. 224. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. **But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury.** (Emphasis added).

Here, this is exactly what the Third District Court of Appeal has done thereby denying to Petitioner "an opportunity to be heard". No determination of the Petitioner's ability to "command his very wealthy father" to pay was made in the Florida Family Court, yet the Florida Third District Court of Appeal usurped this obligation of the Florida Family Court and – upon a limited and incomplete record – made factual determinations which Petitioner never had the opportunity to contest with rebuttal

evidence.

As such, to employ the "Tipsy Coachman" doctrine in this fashion denies Petitioner and opportunity to be heard and thus denies to him due process.

III. The Contempt Order Was Criminal, Not Civil

In order for the contempt finding resulting in incarceration of Petitioner to be considered "civil" rather than "criminal" in nature, it must afford Petitioner an opportunity to purge the contempt and thereby be released from incarceration. As this Court stated in *Gompers v. Buck's Stove & Range Company,* 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911):

> For example: If a defendant should refuse to pay alimony . . . he could be committed until he complied with the order. Unless there were special elements of contumacy, the refusal to pay or to comply with the order is treated as being rather in resistance to the opposite party than in contempt of the court. The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said in *Re Nevitt*, 54 C. C. A. 622, 117 Fed. 451, **'he carries the keys of his prison in his own pocket.' He can end the**

> **sentence and discharge himself at any moment by doing what he had previously refused to do.** (Emphasis added).

Id. at 442. Here, Petitioner could not "end the sentence and discharge himself at any moment by doing what he had previously refused to do" as it is simply a legal fiction created by the Florida Third District Court of Appeal that Petitioner could command his Father to pay Petitioner's child support obligations.

Indeed, Petitioner testified at a previous hearing that he had commanded his Father to pay the child support obligations but that his Father had refused. Moreover, Petitioner subsequently attempted to enforce his right to "command" his Father by suing his Father to pay Petitioner's child support obligations, but the Florida Family Court refused to grant leave to do so holding that no such right exists to compel exists.

Finally, in *Perez v. Perez*, 599 So.2d 682, 683 (Fla. 3d DCA 1992) the Florida Third District Court of Appeal in an identical situation found that the assets of relatives were <u>not</u> to be considered in determining "ability to pay" expressly holding:

> Where incarceration is under consideration as a

> possible remedy for a civil contempt, there must be "a separate, affirmative finding that the contemnor possesses the present ability to comply with the purge conditions set forth in the contempt order." While making that determination, the court may look to all of the **contemnor's assets** from which the amount might be obtained. . . . It is clear that under *Bowen*, the instant inquiry must be directed to the **contemnor's own assets, not those of his relatives.** Thus, there must be a new hearing. . . [I]n the instant civil proceeding, **if, upon remand, the trial court determines that the contemnor does not, himself, presently have the funds to meet the court's order, incarceration cannot be ordered.**

Perez, 599 So.2d at 683. (Emphasis added, citations omitted). Remarkably and with questionable fidelity to intellectual honesty, *Perez* is neither cited nor distiguished by the majority opinion raising questions of equal protection as well as due process for Petitioner here was indefinitely incarcerated based upon the assets of his relatives while Mr. Perez was not. As such, Petitioner's incarceration was not "civil" in nature as he did not personally carry the "keys to the cell" in his pocket. Therefore, Petitioner was jailed for a criminal contempt for which the requisite procedural safeguards were not accorded to

Petitioner as the Florida Third District Court of Appeal itself recognized in *Perez*. As such, the contempt order violated Petitioner's federal due process and equal protection rights.

CONCLUSION

Due process guarantees "notice" and "an opportunity to be heard". Here, Petitioner's wrongly ordered indefinite incarcerated was affirmed by a tribunal that (i) admitted the indefinite incarceration was wrong upon the basis it was ordered and (ii) neither gave Petitioner notice nor an opportunity to be heard on the new basis they utilized to justify his continued indefinite incarceration. Moreover, the finding of civil contempt was in name only, as in truth this was criminal contempt imposed upon Petitioner without the requisite procedural safeguards. Accordingly, the petition for a writ of certiorari should be granted to remedy this avoidance of due process and equal protection in a deprivation of liberty case.

Respectfully submitted,

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Contents of Appendix

Opinions Below

The November 22, 2002, order of the Florida Circuit Court in and for Miami-Dade County, Florida ..... *Appendix -2*

The December 23, 2002, opinion of the Florida Third District Court of Appeals *Appendix-5*

The August 18, 2003, opinion of the Florida Supreme Court *Appendix-17*

Contents of Appendix

Opinions Below

The November 22, 2002, order of the Florida Circuit Court in and for Miami-Dade County, Florida ..... *Appendix -2*

The December 23, 2002, opinion of the Florida Third District Court of Appeals *Appendix-5*

The August 18, 2003, opinion of the Florida Supreme Court *Appendix-17*

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

FAMILY DIVISION

CASE NO. 94-18177 FC 19

IN RE: The Marriage of

BARBARA SIBLEY

Petitioner,

and

MONTGOMERY BLAIR SIBLEY

Respondent.

ORDER OF CONTEMPT AND COMMITMENT TO THE MIAMI-DADE COUNTY CORRECTIONS DEPARTMENT

This cause has come on to be heard upon Mr. Sibley's counsel's Motion for an Emergency pre-incarceration hearing. The Court has previously conducted a pre-incarceration hearing in conformance with the requirements of the law and heard extensive testimony from Mr. Sibley himself at that time. The Court granted this hearing in order to give Mr. Sibley every opportunity to either purge the Contempt or to make a showing of a change in circumstances that would persuade the Court to stay the incarceration. To that end, the Court heard argument and a proffer from Mr. Sibley's counsel. The factual proffers from Counsel, stipulated to by Barbara Sibley, show that there has been absolutely no change in Mr. Sibley's financial situation. Therefor, the Court, having been advised that all stays issued by Appellate Courts have expired as to the Court's prior findings of

Contempt of Court for Non-Payment of Support, hereby reaffirms the prior findings, which are attached to and incorporated in this Order.

The Court has, by those previous factual and legal findings, found, and continues to find that Mr. Sibley has wilfully refused to pay any child support in this cause. He owes, at this time, over one hundred thousand dollars. In its previous Order fording Mr. Sibley in contempt, the Court ordered a payment plan. Mr. Sibley has not complied with the payment plan. Mr. Sibley has not paid even one penny of child support since he left the State of Florida. His behavior is the essence of wilful refusal to obey a Court order. He has substantial personal assets, jointly held with his present wife, which are easily liquidated to cash, which he has refused to use to pay even a small portion of his child support obligation. These assets include sterling silver and art, which could be sold and have not been. The Court notes that Mr. Sibley has retained private counsel, ordered and paid for court reporters and transcripts, transportation, and other litigation costs, including litigation that has been termed frivolous in Federal Court. He has not presented any alternate payment plan.

Therefor, it is Ordered and Adjudged that the Respondent, Montgomery Blair Sibley is ordered immediately committed into the custody of the Department of Corrections of Miami-Dane County. He is to surrender to that authority and the Department of Corrections shall maintain him in custody for an indefinite period, or until such time as he shall pay the purge amount of One Hundred Thousand Dollars, for child support due and owing.

The Court has, additionally, held a hearing on Mr. Sibley's incarceration and fords that his present financial status is unchanged and that he continues to 1) have the ability to pay the past due child support, and 2) that he is willfully refusing to pay his child support obligation. The Court, therefor, will not

abate the finding of Contempt, nor stay the Order for Incarceration.

The Director of the Department of Corrections is Ordered to comply with the Court's Order to hold Mr. Sibley in custody until such time as he shall purge his contempt with the aforementioned payment to Barbara Sibley, or her attorney.

November, 2002.

MAXINE COHEN LANDO
CIRCUIT JUDGE

Done and Ordered this 22nd day of November, 2002.

IN THE DISTRICT COURT OF APPEAL OP FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 2002
DECEMBER 23, 2002
CASE NO.: 3D02-3171
LOWER TRIBUNAL NO. 94-18177

MONTGOMERY BLAIR SIBLEY,
Appellant,

v.

BARBARA SIBLEY,
Appellee.
_____/

An Appeal from the Circuit Court for Dade County, Maxine Cohen Lando, Judge

Billbrough & Marks and G. Bart Billbrough, for appellant. Jay M. Levy; Bette E. Quiat, for appellee.

Before SCHWARTZ, C.J., and COPE and GODERICH, JJ.

SCHWARTZ, Chief Judge. The primary point of the appellant, who is incarcerated for indirect contempt because he failed to discharge an obligation for a large amount of admittedly past due child support--of which he has paid not a single cent--is that the record does not support the express finding below[1] that he has the present ability to pay the purge amount of $100,000.00. We disagree.

We do so because, as the record demonstrates Sibley may command, simply by asking, the payment of the purge amount

through his very wealthy father[2] --who has in effect given many hundreds of thousands of dollars to Mr. Sibley for any and every purpose except the discharge of this particular obligation. Among these are the payment of $250,000.00 cash for a business which nominally supports him, $200,000.00 in the "forgiveness" of a "loan" from the father, and large sums directly for the support of the appellant's present wife[3] and his other child. We are convinced that they include also very substantial sums in legal fees and costs in order to avoid payment,[4] as well as the maintenance of the present expensive proceeding to secure his release from prison without having to meet his adjudicated duty to support these children, even in the smallest part. His failure to do so stems, as the record again shows, and as the trial judge observed only from a stubborn, self-immolating hatred of and vendetta against his ex-wife, who also happens to be the mother of their children, and not from any "inability to pay." In these circumstances, which demonstrate the very epitome of a wilful, contemptuous refusal to obey a binding order of court, the rule that all sums from whatever source available to the contemnor-obligor must be considered to determine his "ability to pay" is peculiarly relevant. *Koll v. Koll*, 812 So. 2d 529 (Fla. 4th DCA 2002); *Mallardi v. Jenne*, 721 So. 2d 380 (Fla. 4th DCA 1998); *Pompey v. Cochran*, 685 So. 2d 1007 (Fla. 4th DCA 1997); *Rose v. Ford*, ___ So. 2d ___ (Fla. 4th DCA Case no. 4D02-954, opinion filed, November 27, 2002)[27 FLW D2560](dictum); see also *Klein v. Klein*, 122 So. 2d 205 (Fla. 3d DCA 1960); *Silvers v. Silvers*, 274 So. 2d 555 (Fla. 3d DCA1973); *Silberman v. Silberman*, 670 So. 2d 1109 (Fla. 3d DCA1996). Its application compels the rejection of the appellant's argument that, on the merits, he should not be in jail for civil contempt. In our judgment, he is in the right place for the right reason.[5]

Affirmed.

GODERICH, J., concurs.

DISSENT BY: COPE

DISSENT: COPE, J. (dissenting).

The incarceration order was entered on the theory that the former husband, Montgomery Blair Sibley, has sufficient personal property to sell so as to obtain the $100,000 purge amount. As the record does not adequately support that proposition, we should remand to set a proper purge condition.

I.

The parties divorced in 1994. The former husband was the primary residential parent. Both parents lived in the Miami area.

It was agreed by the parties that if the former husband moved away, the three children of the marriage would remain in the Miami area with Barbara Sibley, the former wife. In that event, the former husband was to pay child support of $4,000 per month.[6]

The former husband is a member of The Florida Bar who practiced law in Miami. Subsequent to the divorce, the former husband remarried. In 2000, the former husband moved to Maryland. This triggered the obligation to pay $4,000 per month in child support.

The former husband never paid any of the child support. After protracted enforcement proceedings in the trial court in which the former husband represented himself,[7] the trial court entered a civil contempt order providing for the incarceration of the husband. The purge amount was set at $100,000.

The former husband has appealed. By unpublished order, this court ruled that the former husband could obtain a stay of the order pending appeal by posting a $100,000 bond. The former husband has not posted the bond and is incarcerated.

II.

It seems to me that in footnote two of the majority opinion, the majority concedes the point which requires reversal. Footnote two states that the former husband has "substantial assets, although admittedly not in the purge amount, in his own name." Majority opinion at 2 n. 2 (emphasis added).

The incarceration order in this case was entered precisely on the theory that the former husband does have $100,000 in assets in his personal possession with which to satisfy the purge amount. The majority opinion concedes that the record does not adequately support the trial court's view of the matter.

The former wife testified that the former husband received in the dissolution of marriage various items of silver and artwork. She placed a value of $10,000 on one silver tray, but the record contains no valuation of any of the other items, and there is a dispute about the former husband's continuing ownership of some of the items.

Under *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985), the court must determine whether the contemnor possesses the ability to pay the purge amount. *Id.* at 1279. In making this determination, "the trial court is not limited to the amount of cash immediately available to the contemnor; rather the court may look to all assets from which the amount might be obtained." Id. (emphasis in original).

In the present situation, the trial court has at least two alternatives. One is to obtain reasonable estimates of value of the items which remain in the former husband's possession. Because the property is in Maryland, the distance and expense of appraisal may make this an unattractive alternative.

The speedier alternative would be to modify the purge condition to allow release of the former husband upon turnover

of the assets to a proper agent for the wife in Maryland. The wife would then be required to sell those items of personal property in a commercially reasonable manner. This approach would avoid the delay and expense of appraisal.

While the trial court's order does not say in so many words that the $100,000 purge amount was supposed to come from the personal property of the former husband, that is the only reasonable interpretation of the order.[8]Further, in her brief in this court, the former wife has defended the order on the theory that the former husband has sufficient assets to pay the purge amount. The former wife makes reference to the assets of the former husband's father--Harper Sibley, Jr.--only in passing in a footnote. Appellee's brief at 20 n. 12.

We should reverse the incarceration order and remand for the trial court to enter a revised purge condition, which the former husband would have the present ability to satisfy.

III.

The majority opinion takes the position that the former husband should obtain the purge amount from his father, Harper Sibley, Jr. This was not the basis of the trial court's ruling. In ruling as it has, the majority opinion relies on the "tipsy coachman" doctrine, or "right for the wrong reason" rule.

The Florida Supreme Court has said:

[Respondent] attempts to invoke the "tipsy coachman" doctrine, which permits a reviewing court to affirm a decision from a lower tribunal that reaches the right result for the wrong reasons so long as "there is any basis which would support the judgment in the record." *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999).

As this Court recently reiterated in *Robertson v. State*, 27 Fla. L.

Weekly S 829 (Fla. Oct. 10, 2002), the key to applying the tipsy coachman doctrine is that the record before the trial court must support the alternative theory or principle of law. See *Robertson v. State*, 27 Fla. L. Weekly at S 830; see also *State Dept. of Revenue ex rel. Rochell v. Morris*, 736 So. 2d 41, 42 (Fla. 1st] DCA 1999). On that basis, the doctrine cannot be applied in this case because the record does not provide an adequate basis for us to reach such materiality conclusion as a pure matter of law. *State Farm Fire and Cas. Co. v. Levine*, No. SC01-2085, at 4-5 (Fla. Dec. 19, 2002).

In the present case the trial court heard testimony from the former husband's father, Harper Sibley, Jr., in July 2002. The trial court limited the inquiry to two specific issues: the fact that Mr. Sibley had stopped paying the tuition for the grandchildren (the children of this marriage), and what gifts or property he had given to the former husband.

It is telling that the trial court itself restricted the amount of inquiry which could be made of Mr. Sibley, and after hearing the testimony, did not base the purge amount on Mr. Sibley's ability to pay. The trial court fashioned the contempt order and purge amount based on the trial court's conclusions regarding the former husband's ability to pay.

If there is a theory on which Mr. Sibley can be considered a source of funds to satisfy the purge condition, then proper procedure requires that issue to be first addressed in the trial court.

With regard to the merits, there is no question but that over the years, the former husband, the former wife, and the children of the marriage all enjoyed large gifts from Mr. Sibley. As a general proposition, however, this court has rejected the idea that the availability of loans or gifts from wealthy relatives translates into the present ability to pay a purge amount.

The former husband relies on *Perez v. Perez*, 599 So. 2d 682 (Fla. 3d DCA 1992), which said:

The purpose of a civil contempt proceeding is to obtain compliance on the part of a person subject to an order of the court. *Bowen v. Bowen*, 471 So. 2d 1274, 1277 (Fla. 1985). Where incarceration is under consideration as a possible remedy for a civil contempt, there must be "a separate, affirmative finding that the contemnor possesses the present ability to comply with the purge conditions set forth in the contempt order." *Id.* at 1279. While making that determination, the court may look to all of the contemnor's assets from which the amount might be obtained. *Id.* See *Russell v. Russell*, 559 So. 2d 675 (Fla. 3d DCA 1990).

In the present case, it appears the trial court based its finding of present ability to pay, and the finding of contempt, on the general master's outrageous theory that Perez could obtain a loan from his relatives. The findings of the general master, upon whose report the trial court relied, stated in part:

The General Master finds that the Respondent/Husband has the superior ability to pay the Petitioner/Wife's attorney's fees and costs as the testimony showed that he can readily borrow the funds from relatives.

. . . .

It is clear that under *Bowen*, the instant inquiry must be directed to the contemnor's own assets, not those of his relatives. Thus, there must be a new hearing. *Russell*, 559 So. 2d at 676. As noted in *Russell*, the *Bowen* case envisions a two-stage inquiry in civil contempt proceedings: first, a determination of whether the respondent has willfully violated the court order, id. at 1278-79; second, the decision as to what remedy is appropriate. *Id.* at 1279. *Perez*, 599 So. 2d at 683; see also *Sol v. Sol*, 656 So. 2d 206 (Fla. 3d DCA 1995).[9]

Up to a point, the former husband's reliance on *Perez* is well taken. The mere fact that Mr. Sibley has in the past made large gifts to the former husband and family members is not (without more) sufficient to allow consideration of Mr. Sibley's assets in setting a purge amount for the former husband. In this case, however, there are other circumstances to be considered.

We are dealing with child support in this case. The court's orders must be respected, and the court cannot allow child support orders to be interfered with.

In the present case Mr. Sibley and the former husband are in business together. Mr. Sibley purchased a business for $250,000 which is operated by the former husband. The business manufactures custom carrying cases for computers and other sensitive equipment. There are three employees besides the former husband.

The former husband's net salary is $2,500 per month. The business pays another $2,500 per month for the rental of a house owned by Mr. Sibley, in which the former husband resides. The record reasonably supports the conclusion that the business also pays a great deal of the former husband's personal expenses.

The business currently operates at a loss. When additional working capital is needed, Mr. Sibley provides it. Of course, $2,500 per month routinely goes back to Mr. Sibley in the form of rent, so part of the working capital merely travels in a circle.

Although the point has not been raised below or argued here, it seems to me that we should treat as a civil wrong, or contempt, the structuring of employment arrangements so as to conceal income which would otherwise be available to satisfy an outstanding child support award. Where a third party participates in a scheme to conceal such income, then that should be a basis for imposition of liability on the third person,

as well as the obligor. And the interweaving of the business affairs of the obligor and the third person distinguish such a case from Perez.

While the circumstances suggest that such collusion occurred in this case, that issue has not been asserted or tried in the trial court. We should allow the issue to be explored on remand.[10]

IV.

The present record certainly supports the proposition that the former husband is intentionally underemployed and has divested himself of assets which could have been used to pay his child support obligation. For such conduct the remedy is indirect criminal contempt, not civil contempt. As we have stated:

An intentional divestiture of assets with intent to avoid the payment obligation can be a ground for civil contempt. . . . Where there has been a divestiture of assets incarceration cannot be selected as the remedy because the contemnor does not have the present ability to purge himself. If the court concludes that the respondent has willfully divested himself of the ability to pay, then that conduct may be punished by incarceration or otherwise in a criminal contempt proceeding with the attendant due process safeguards. *Russell v. Russell*, 559 So. 2d at 677.

V.

In sum, the present record and established precedent do not support the proposition that the former husband has the present ability to pay the $100,000 purge amount. The order now before us should be reversed and the cause remanded to set an appropriate purge amount or purge condition.

Notes:

[1] The presence of such a finding is indispensable to the validity of the order. See *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985).

[2] Notwithstanding that the appellant has adamantly refused to reveal many of his financial records--which in itself raises a strong presumption against him, *City of Miami v. Rantanen*, 645 So. 2d 4 (Fla. 1st DCA 1994)--the record shows substantial assets, although admittedly not in the purge amount, in his own name.

[3] The senior Sibley purchased a three-bedroom, three-story town home in Maryland in which the son, his new wife, and child lived and where he now lives alone. Although there is no record either that such a payment was ever made or what the source of such a payment may have been, see supra note 2, the rent supposedly due the father is $2500.00 per month.

[4] The following is only a partial recounting of the litigation he has unsuccessfully generated to achieve that end:

Sibley v. Sibley, 823 So. 2d 785 (Fla. 3d DCA 2002)(table); *Sibley v. Sibley*, 816 So. 2d 136 (Fla. 3d DCA 2002); *Sibley v. Sibley*, 815 So. 2d 673 (Fla. 3d DCA 2002), *review denied*, No. SC02-1309 (Fla. Nov. 22, 2002)(table); *Sibley v. Sibley*, 814 So. 2d 1054 (Fla. 3d DCA 2002)(table); *Sibley v. Sibley*, 793 So. 2d 959 (Fla. 3d DCA 2001)(table); *Sibley v. Sibley*, 803 So. 2d 738 (Fla. 3d DCA 2001)(table); *Sibley v. Sibley*, 795 So. 2d 71 (Fla. 3d DCA 2001)(table); *Sibley v. Sibley*, 791 So. 2d 481 (Fla. 3d DCA 2001)(table); *Sibley v. Sibley*, 771 So. 2d 1175 (Fla. 3d DCA2000)(table); *Sibley v. Sibley*, 751 So. 2d 586 (Fla. 3d DCA2000)(table); *Sibley v. Sibley*, 733 So. 2d 529 (Fla. 3d DCA1999)(table); *Sibley v. Sibley*, 732 So. 2d 1079 (Fla. 3d DCA1999)(table); *Sibley v. Sibley*, 725 So. 2d 1273 (Fla. 3d DCA1999); *Sibley v. Sibley*, 710 So. 2d 1017 (Fla. 3d DCA 1998);

Sibley v. Sibley, 34 Fed.Appx. 969, ___ F.3d___ (11th Cir. 2002)(table).

[5] In the light of this conclusion, we consider that the appellant's other point, which claims defects in the orders below, see Fla.Fam.L.R.P. 12.615 (2002), does not present harmful error.

Gonzalez v. Gonzalez, ___ So. 2d ___ (Fla. 3d DCA Case no. 3D02- 1922, opinion filed, December 23, 2002); *Broadfoot v. Broadfoot*, 791 So. 2d 584 (Fla. 3d DCA 2001).

[6] There was also an agreement regarding the payment of tuition for the children at private schools and college. Those issues are not involved in the present appeal.

[7] It appears the first time the former husband hired counsel was for this appeal.

[8] Under Family Law Rule 12.615(e), the incarceration order should specify the intended source of the purge amount:

(e) Purge. If the court orders incarceration, a coercive fine, or any other coercive sanction for failure to comply with a prior support order, the court shall set conditions for purge of the contempt, based on the contemnor's present ability to comply. The court shall include in its order a separate affirmative finding that the contemnor has the present ability to comply with the purge and the factual basis for that finding.(Emphasis added).

[9] Perhaps in this case or an appropriate case we should revisit *Perez*. By statute, Texas requires an obligor in a child support case to attempt to borrow the funds to pay the child support, or arrearage, from any appropriate available source, including relatives. See Tex. Fam. Code Ann. § 157.008(c)(3), (4) (Vernon2002); *Ex parte Bregencer*, 802 S.W. 2d 884 (Tex. App. 1991). The Texas approach appears reasonable.

[10] Where, as here, a business pays the former husband not only a salary, but his living expenses, it would appear to me that an income deduction order can be imposed, either on the husband's stated salary or on the gross income of the business. While that may be a tool to resolve the payment of child support on an ongoing basis, there is no showing anywhere that the business has the assets or income to supply the $100,000 purge amount.

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Supreme Court of Florida

MONDAY, AUGUST 18, 2003
CASE NO.: SC03-8

Lower Tribunal No.: 3D02-3171

MONTGOMERY BLAIR SIBLEY vs. BARBARA SIBLEY
Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

WELLS, QUINCE, CANTERO and BELL, JJ., concur.
ANSTEAD, C.J., PARIENTE and LEWIS, ii., dissent.

Petitioner's Motion for Attorney's Fees and Motion for Stay are hereby denied.

ANSTEAD, C.J., and WELLS, PARIENTE, LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

Respondent's Suggestion of Mootness is hereby denied.

ANSTEAD, C.J., and PARIENTE, LEWIS, CANTERO and BELL, JJ., concur. WELLS and QUINCE, JJ., dissent.

A True Copy Test:

Thomas D. Hall